ROBERT J. PROCTOR, ET UX.

IBLA 89-524, 89-537 Decided December 6, 1992

Appeal from separate decisions of the Elko District Manager, Bureau of Land Management, rejecting desert land entry applications. N-22889 and N-22890.

Affirmed in part; set aside and remanded in part.

1. Desert Land Entry: Cultivation and Reclamation

> The raising of Christmas trees on desert land by means of irrigation and tilling the soil does not constitute cultivation as contemplated under the Desert Land Act, as amended, 43 U.S.C. §§ 321-39 (1988).

APPEARANCES: Robert J. Proctor, pro se and for Patricia K. Proctor.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Robert J. Proctor and Patricia K. Proctor have appealed from separate decisions of the Elko District Manager, Bureau of Land Management (BLM), dated May 24, 1989, rejecting their desert land entry (DLE) applications, N-22889 and N-22890. These applications were originally filed on March 29, 1979, each embracing 320 acres of land located, respectively, within secs. 31 and 32, T. 28 N., R. 56 E., Mount Diablo Meridian, Elko County, Nevada. As submitted, the applications proposed to obtain water from a well and to irrigate the land by means of a sprinkler system for the purpose of growing garlic, onions, carrots, and alfalfa or wheat on a rotation basis.

Following the receipt of these applications and those submitted by five other individuals in the general vicinity, BLM prepared an environmental assessment (EA) to determine the environmental consequences of classification of the lands within the various applications as suitable for desert land entry. This EA (EA-NV-010-6-102), dated September 2, 1986, recommended that all of the land within the Proctors' applications
be classified as suitable for desert entry, with the exception of 80 acres in Robert Proctor's application which embraced a source of above-ground water and were not, therefore, desert in nature, and further recommended that the applications, with the exception of the specified 80 acres, be allowed. Subsequent thereto, Robert Proctor submitted an amendment to his entry application deleting the identified 80 acres, which amendment was approved by BLM on October 1, 1986.

In accord with the EA, a Proposed Classification decision was issued by the Nevada State Director, BLM which afforded interested parties 30 days in which to comment on the recommended classification of the subject desert land entry. Pro-tests to the proposed reclassification were subsequently filed by Leonard Merkley, the hold with respect to the Twin Creek East Allotment, which includes the land encompassed by the Proctors' DLE applicat Barnes, referred to by BLM as a representative of the Elko District Grazing Advisory Board. See 43 CFR 2450.4. protests, the State Director issued an Initial Classification Decision on July 23, 1987. That decision classified th land encompassed by the Proctors' DLE applications as suitable for desert land entry, subject to review by the S 2450.5.

Merkley objected to the initial classification decision on August 3, 1987, essentially resubmitting his Proposed Classification decision. Relying on various publications of the Nevada Cooperative Extension Service affidavit of Fred C. Worline, who was farming a 40-acre parcel adjacent to the land sought by the Proctors, Merkley a would not be able to sustain an economically viable farming operation:

> As shown on their applications, the Proctors propose to rotate "truck crops," garlic, onions and carrots, and wheat. The short growing season, soil conditions, and well water depth in the proposed Huntington and long distances to any market areas militate against any commercial farming of such truck crops. * * commercial garlic, onion (or carrot) farming operation is operating in Elko or Eureka Counties. * * * Foc production of alfalfa alone, the applicants' chance of economic survival in this farming venture are almost r

(Attachment to Aug. 3, 1987, Protest at 1-2).

On August 20, 1987, the Acting Deputy Director, BLM, informed the protestant that he was requesting the to make an analysis of the issues raised by the protest. The State Director, in turn, by memorandum dated June 2 District Manager to evaluate Merkley's protest, with particular attention to determining the likelihood that the land could "be developed into a profitable operation on a 'permanent' basis."

1/ According to BLM, Merkley stands to lose 180 AUM's (animal unit months) of grazing use as a result of allowar desert land entries. This represents almost 28 percent of the total AUM's allocated to him on the Twin Creek Ea

In the course of preparing a response to the State Director's request, the Elko District Realty Specialist co
Robert Proctor informed him that they had been rethinking their plans for developing the entries and had tentatively
and then feed it to their livestock. Proctor promised to provide the District Office with their latest development p
See Memorandum to File, dated July 27, 1988.

On August 26, 1988, the applicants submitted a revised application
form indicating that the designated crop would be Christmas trees. Upon receipt of these documents, the District Off
of the State Office as to the allowability of a desert land entry for the purposes of Christmas tree production. By me
9, 1989, the State Director concluded that cultivation of Christmas trees was not the growing of an "agricultural cro
of the Desert Land Act and suggested the rejection of the proposed changes. By decision dated May 24, 1989, the
reiterating the State Director's determination that coniferous trees were not considered an acceptable crop, rejected
Appellants thereupon appealed to this
Board.

We note at the outset that rejection of the DLE applications was clearly improper. By their submissio
appellants sought to amend their pending applications to indicate that the crop to be grown would be Christmas tr
the case, the District Office had determined that this was not a proper crop, the correct course of action would hav
the amendment, not the subsisting application, as was done herein. To that extent, therefore, the decisions below

Be that as it may, appellants in their appeal to the Board, clearly take issue with the determination
coniferous trees for sale as Christmas trees is not the growing of an "agricultural crop" within the meaning of
Accordingly, to the extent that the decision below also implicitly rejected the proposed amendment to their applic
ripe for determination.

In their statement of reasons for appeal (SOR), appellants contend
that Christmas trees are not expressly excluded as acceptable crops under the Desert Land Act either by the
regulations, or Departmental precedent. Rather, they argue that such trees fall under the definition of a "crop" set f
5(a)(4), viz., "any agricultural product to which the land under consideration is generally adapted and which wou
for the expense of producing it." As proof of this, they note that "Christmas tree production and sales is an ann
agricultural industry" and that the Nevada Department of Agriculture planted a test plot of Christmas trees 20 ye
irrigated and cultivated it: "Not all varieties of Christmas trees were successful, but several types were. From th

marketable Christmas trees were proven to grow on lands similar to the applied for lands" (SOR at 2).

[1] Section 1 of the Desert Land Act, as amended, authorizes the Secretary of the Interior to patent up to 3
2/ to
an entryman where he makes satisfactory proof of "reclamation" of the land by conducting water upon it and pay
U.S.C. § 321 (1988). Such proof must consist of a showing that the entryman has spent at least $3 per acre "in th
reclamation, and cultivation of the land" and has also cultivated at least one-eighth of the land. 43 U.S.C. § 328 (198
indicates that such endeavors are to be directed to the production of "ordinary agricultural crops." 43 U.S.C. § 3

While appellants are correct that there has been no Departmental adjudication explicitly rejecting the cu
trees as
the growing of an "agricultural crop" as required by the Desert Land Act, supra, this question has been examine
Homestead Act, as amended, 43 U.S.C. § 161 (1976) (repealed by section 702 of the Federal Land Policy and Ma
(FLPMA), 90 Stat. 2787).

It is true that in Ferdinand J. Clifford, 42 L.D. 535 (1913), the Department held that the planting of fi
technically horticulture, did fulfill the statutory requirement under the Homestead Act that an entryman cultivat
However, in Lauren M. Lucas, Oregon 09887 (Dec. 7, 1960), the Director, BLM, noted that "the courts have l
ordinarily understood to mean wheat, corn, potatoes, or other annual crops which are cultivated and harvested d
season. It does not apply to the planting of timber seeds or cuttings." And, in Herman H. Moore, Sacramento 049
BLM Director expressly held that "[t]he growing of Christmas trees cannot be considered as cultivation under th

The difference between Clifford, on the one hand, and Lucas and Moore, on the other, is that, with respec
and not the tree is the "crop" being cultivated, whereas with Christmas trees, it is the tree itself which is the object o
while horticulture was accepted as an agricultural use within the meaning of the Homestead Act, silviculture was

2/ Desert land is defined as "[a]ll lands exclusive of timber lands and mineral lands which will not, without irr
agricultural crop." 43 U.S.C. § 322 (1988).
3/ It should be pointed out, however, that, for a short period of time, cultivation of timber could qualify an entry
the Homestead Act. This, however, was the result of section 4 of the Timber Culture Act of 1873, 17 Stat. 60
considered subsequently in the text of this decision. That section provided that, where

Admittedly, both Lucas and Moore dealt with interpretation of "cultivation" under the Homestead Act recognized that the requirement of "cultivation" under the Desert Land Act is identical to that under the Homeste Claude E. Crumb, 62 I.D. 99, 102 (1955); Brandon v. Costley, 34 L.D. 488, 500 (1906). Indeed, as just one ex Clifford, which permitted the cultivation of deciduous trees for their fruit under the Homestead Act, was eventuall entries in Samuel D. Block, 45 L.D. 481, 484 (1916). Since the ultimate goal of both the Homestead Act and the the same, viz., the transformation of heretofore undeveloped land into productive farms, with the primary diffe relating to the character of the land involved rather than the use to which it was being put, it makes eminent good s standards with respect
to cultivation under one statute as was applied under the other statute.
To the extent, therefore, that the Department has rejected attempts to cultivate Christmas trees in fulfillment of t Homestead Act, a similar result should obtain under the Desert Land Act.

Moreover, as was noted in the concurring opinion in William S. Archibald, 75 IBLA 236, 240 (1983), there to reject the cultivation of Christmas trees under the Desert Land Act. By its own terms, the Desert Land Act was mineral in character or to timber lands. See 43 U.S.C. § 322 (1988). Allowance of Christmas tree cultivation und would have the anomalous result of permitting the cultivation of trees under the Desert Land Act, whose presence prior to the allowance of the entry would have barred entry under that Act. See, e.g., Vladimir P. Havlik, 61 I.D. Riley, 5 L.D. 595 (1887).

Finally, while appellants argue that Christmas tree production is now considered to be an agricultural u allowed under the Desert Land Act, the proper ambit of that Act is necessarily constricted
by consideration of the original intent which animated its adoption. At
the time the original Desert Land Act was enacted in 1877, Congress had already provided in the Timber Culture Ac a mechanism whereby entry could be made on the public lands with a view towards

fn. 3 (continued)
a homestead entryman had established residency on the entry, patent could issue upon a showing that the entryman for at least
2 years, 1 acre of timber for each 16 acres of entered land. The Timber Culture Act was repealed by section 1 of the of Mar. 3, 1891, 26 Stat. 1095, largely because of the view that the Timber Culture Act had become the source of generally Gates, History of Public Land Law Development (1968) at 560. Far from undermining the Department silvicultural endeavors under the Homestead Act, this history actually supports it, since it is clear that absent the s Timber Culture Act, cultivation of timber would not have been a qualifying use under the Homestead Act.

the cultivation of timber. This latter Act permitted individuals to make entry on a quarter section of land for the p
cultivating timber. Unlike the Desert Land Act, which, in its initial form,
had no requirement that proof of cultivation be submitted but did require
an application for patent to be made within 3 years of the allowance of
the entry, the Timber Culture Act, as originally adopted, required that
the trees be cultivated for 10 years prior to the issuance of patent.
This totally disparate treatment, under almost contemporaneously adopted statutes, buttresses the view that Congress
Land Act, did not intend silvicultural endeavors to qualify under that Act. 4/ Indeed, even when the Desert Lan
require proof of cultivation, the time for submission of final proof was extended to 4 years, clearly insufficient tir
under the Timber Culture
Act.

We have indicated in at least one recent case that "cultivation" under the Desert Land Act could be ext
which might not have been considered to be "agricultural crops" at the time of the adoption of the Desert Land Act.
90 IBLA 69 (1987) (cultivation of jojoba for the extraction of oil). Where, however, as in the instant case, the quest
"cultivation" can be extended to embrace purely silvicultural endeavors, expansion of the scope of the Desert Lan
activities would not be merely a logical extension of Congressional intent but, on the contrary, would result in a clea
intent and constitute a determination totally inconsistent with Departmental adjudications stretching over a full c

In view of the foregoing, we hold that the growing of Christmas trees does not constitute the growing of
crops" within the meaning of 43 U.S.C. § 327 (1988), and accordingly affirm the rejection of appellants' amendr
extent that the decision below rejected the subsisting DLE applications, it must be set aside for the reasons discu

4/ Moreover, it is clear that the Timber Culture Act, as interpreted by the Department, actually applied to desert land
consistently held that if irrigation was necessary to foster the cultiva-tion of timber, an entryman under the Timber Cu
to
so irrigate. See, e.g., Cummings v. Rudy, 16 L.D. 115 (1893); Sampson v. Lawrence, 8 L.D. 511 (1889). Since, a
original Desert Land Act had no requirement that proof of cultivation be submitted (that requirement being add
General Revision Act of 1891, 26 Stat. 1097), it would have been totally illogical to require irrigation under the
entries could be made under the Desert Land Act for the purpose of growing timber, particularly since only
a quarter section of land could be entered under the Timber Culture Act, whereas a full section could be entered un
Land Act.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the In
determination that Christmas tree production is not permissible under the Desert Land
Act is affirmed, but the decisions rejecting the applications are set
aside and the case files are remanded for further action consistent with
the foregoing.

James L. Burski
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge